

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

SC085824

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

STATE OF MISSOURI)	
Ex rel. N.H.L.,)	
)	
Relators,)	
)	SC085824
vs.)	
)	
THE HONORABLE)	
Tom W. DePriest, Jr.,)	
)	
Respondent.)	

BRIEF OF RELATOR

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Jurisdictional Statement

This Court has jurisdiction on this petition for original writ pursuant to Article V, Sections 3 and 4 of the Missouri Constitution and Rules 84.22 and 84.23. The Petition involves the issue of whether under the Missouri and U.S. Constitutions a court can grant an adoption pursuant to Chapter 453, Revised Statutes of Missouri, 2002 before a parent exhausts her appeal rights from the termination of her parental rights. This Court granted a Preliminary Writ of Prohibition in this matter against Respondent on March 3, 2004.

Statement of Facts

The matter before this Court involves the right to a meaningful appeal of a mother whose rights to her son have been terminated in an adoption proceeding pursuant to RSMo. Section 453.040(7).

In 2001, nearly two years before filing of the case that gave rise to this action, Relator consented to legal placement of her son in a guardianship with the child's maternal grandmother and her husband. (A.50.) Letters of guardianship were then entered by a St. Louis County Circuit Court, and the child remained in the legal and physical custody of the guardians up to and through the time of the adoption action. (A.7-9.) On December 16, 2002 the guardians petitioned for adoption. Their petition pled one count alleging abandonment or neglect under Section 453.040(7), which purports to allow a finding of abandonment or neglect as a basis for severing the rights of a parent without her consent where others seek to adopt her child. The petition filed by the guardians in this case set forth no other grounds for the termination of Relator's rights. (A.45-47.) Since the petition did not include any allegations under Section 211 the Missouri Department of Social Services, Division of Family Services had no involvement in the matter. Relator contested the petition, and a trial ensued. (A.1-2.)

On January 13, 2004 Respondent entered a Judgment and Decree of Adoption, finding that Relator abandoned and neglected her son. (A.1-2.) In his order Respondent granted the adoption forthwith. Unable to effect the processing of her appeal prior to the adoption order, Relator immediately filed her Motion to Stay

Adoption, seeking a stay until such time as her appellate rights are exhausted, or until this Court ruled on her writ of prohibition. (A.5-6.) In an order dated January 21, 2004, Respondent denied the Motion to Stay Adoption. (A.3-4.)

Despite Respondent's refusal of a stay, Relator proceeded to file her Notice of Appeal with the Eastern District Court of Appeals on January 29, 2004, ED84106. (A.48-49.) In addition, she filed a Petition in Prohibition, SC85824, seeking to prohibit Respondent from entering final orders necessary for the adoption of her son or requiring Respondent to rescind his final adoption order. This Court granted its Preliminary Writ of Prohibition on March 3, 2004, ordering Respondent to show cause why he should not be prohibited from doing anything other than setting aside the judgment and decree of adoption, and ordering him to take no further action until further order of the Court. Respondent chose to respond and filed his response on April 2, 2004. A briefing schedule issued and the matter is docketed for oral argument on May 12, 2004.

Relator filed her Appellant's Brief in ED84106 with the Eastern District Court of Appeals on April 12, 2004.

Point Relied Upon with Authority

I. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding A.J.L.H. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator has an ongoing familial relationship with her child, guaranteed by Missouri Law and the Constitution of the United States, until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775 (Mo. banc 2003)

State ex. Rel. T.W. v. Ohmer, ____ S.W.3d ____ (Mo. banc March 30, 2004)

In re JK, 661 N.W.2d 216 (Mich. 2003)

Howlett v. Rose, 496 U.S. 356 (1990)

Missouri Revised Statutes Section 211.447

Missouri Revised Statutes Section 453.011

Missouri Revised Statutes Section 453.040

Missouri Revised Statutes Section 453.140

Argument

Standard for Issuing a Writ of Prohibition

Generally, writs of prohibition are issued when they fall within one of three categories:

- 1) when there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction,
- 2) where there exists a clear excess of jurisdiction or abuse of discretion such that the trial court lacks the power to act as contemplated; or
- 3) where there is no adequate remedy by appeal.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003). Writs of prohibition are not issued as a matter of right. Rather, whether a writ should issue in a particular case is a question left to the sound discretion of the court in which a petition has been filed. *State ex rel. Nixon v. Campbell*, 120 S.W.3d 225, 227 (Mo. App. E.D. 2003). The power to issue a writ of prohibition is limited to correction or limitation of an inferior court or agency that is acting without, or in excess of, their jurisdiction. *State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883, 885 (Mo. App. W.D. 2003).

Relator does not contest the trial court's ability to enter a judgment pursuant to Section 453.040. Relator contests the trial court's denial of her Motion to Stay the adoption of her child prior to the final disposition of her appeal (A.3-4.) and therefore the Writ of Prohibition is the appropriate remedy.

I. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding A.J.L.H. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator has an ongoing familial relationship with her child, guaranteed by Missouri Law and the Constitution of the United States, until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination.

Adoptions are governed by Missouri Revised Statutes Chapter 453 – Adoption and Foster Care. In adoption cases, two separate and distinct elements are necessary before a judgment can be entered; termination of parental rights and adoption of the child. It is this “*unbundled*” version of the procedure surrounding adoptions that must be examined with this Petition for Writ of Prohibition.

The obvious prerequisite to any adoption is the consent of the natural parents or the involuntary termination of their parental rights. *In the Matter of J.F.K.*, 853 S.W.2d 932, 934 (Mo. banc 1993). Relator contested the termination of her rights and the adoption of her child. Relator has the right to appeal the termination of her parental rights, *In the Interest of D.S.G.*, 947 S.W.2d 516, 518 (Mo. App. E.D. 1997) as well as her son's adoption. It is an abuse of discretion

and a circuit court lacks the power to proceed with adoption of a child who has been the subject of a termination of parental rights while an appeal of the judgment terminating parental rights is pending. *State ex rel. T.W., v. Ohmer*, ___ S.W.3d ___ (Mo. banc March 30, 2004). Therefore Relator contends that until her appeal is finally determined, her parental rights have not been finally terminated and thus an adoption should not be finalized.

A. Relator has the right to a meaningful appeal of the termination of her parental rights and the adoption of her child.

1. Validity of decree not subject to attack for irregularities after expiration of one year. Section 453.140.

Section 453.140 provides that after the expiration of one year from the date of entry of the decree of adoption, the validity of that decree may not be attacked in any proceeding, for any reason, presumably even if the judgment terminating a parent's rights was found to be invalid by a reviewing Court. Here Relator's rights were terminated by the trial court on January 12, 2004. (A.1-2.). Even though Relator is pursuing an appeal, with a request to transfer now pending before this Court, SC85929, there is no guarantee that the final disposition of her appeal will be within that one year time frame.

This statute intimates that even if her legal parental rights were re-established by this Court one day after the expiration of one year, January 13,

2005, no court would have the authority to vacate the decree of adoption. Without the granting of this Petition for Prohibition, Relator is not afforded the right to a meaningful appeal of the termination of her parental rights and the adoption of her child.

2. Principles of Due Process requires that a trial court stay finalization of an adoption where the parent's appeal of that decision remains pending.

The Missouri Legislature has acknowledged that although permanent placement of a child who is subject to an adoption proceeding is a priority, that goal does not usurp the protection of the “rights of all parties” involved. Section 453.011.3.

3. It is the intent of the general assembly that the permanency of the placement of a child who is the subject of a termination of parental rights proceeding or an adoption proceeding not be delayed any longer than is absolutely necessary *consistent with the rights of all parties*, but that the rights of the child to permanency at the earliest possible date be given priority over all other civil litigation other than division of family services' child protection cases. (emphasis added)

The statute contemplates that an adoption or other permanent planning must proceed in compliance with the due process rights of Relator and other parents faced with termination of their parental rights. By its choice of language, the

Missouri Legislature acknowledged that some adoption cases will take longer than others. The statute provides that the adoption must be consistent with the rights of all the parties, including a parent's right to appeal a termination of parental rights decision. Missouri law currently envisions that adoptions should not become final until the "rights of all parties" are guaranteed.

3. A survey of recent precedent in Missouri and authority from other states militates that Relator's request to stay the adoption of her child while there is a review of her termination of her parental rights should have been granted.

This Court recently held that while an appeal of a termination of parental rights is pending, it is an abuse of discretion and a circuit court lacks the authority to proceed with an adoption. *T.W.*, ____ S.W.3d at _____. Although Relator acknowledges that the *T.W.* case involved termination of parental rights under Chapter 211 – Juvenile Courts, specifically 211.447 – Order of Termination, *T.W.* and the present case are similar in that each involves a contested termination of parental rights decision and an adoption of the minors in the underlying cause of action prior to the final disposition of an appeal. The fact that an adoption took place several months after Relator's rights were terminated in *T.W.* was not determinative for this Court. *Id.* at _____. This Court was persuaded by the fact that proceeding with an adoption while the termination is reviewed on appeal compromises the parent's right to appellate review. *Id.* at _____.

While Relator concedes that holdings from other states are not controlling precedent here, they provide a clear and concise explication of the due process principle that Relator brings to this Court's attention. The Michigan Supreme Court in *In re JK*, states that "[p]arents whose rights have been terminated by the trial court are entitled to appellate review of [that] decision without that review being compromised by the specter of appellate courts having to undo an adoption as a concomitant act to the granting of relief for those parents." 661 N.W.2d 216, 225 (Mich. 2003) (A.16-26.) Such a result is contrary to the structure of the "justice system established" by the state Constitution and its laws. *Id.*

The Nevada Supreme Court was faced with an appeal from a termination of parental rights case wherein the adoption was finalized during the course of the appeal. *Kobinski v. State, Welfare Div.*, 738 P.2d 895, 898 (Nev. 1987) (A.29-31.) Although the court found that there was more than sufficient evidence to justify termination of the parent's rights, they were "greatly disturbed" to learn in the course of oral arguments that the "children were adopted during the pendency of the appeal." *Id.* The court warned that "such a course seems very ill advised." *Id.* It went on to say that "any termination of parental rights is subject to careful scrutiny on appeal, and reversal is always a possibility." *Id.* While the court found that Nevada statutes did not preclude finalizing adoption under these circumstances, "the possibility of future trauma to the child implicates public policy and justifies refusal to enter an adoption decree" under Nevada statutes. *Id.*

A Kansas appellate court was faced with the question of whether a trial court had jurisdiction to enter a decree in an adoption case after the parent had appealed the order terminating his parental rights. *In Interest of Baby Boy N.*, 874 P.2d 680, 690 (Kan. App. 1994) (A.32-41.) In Kansas, appeals are subject to the provisions of K.S.A. 59-2407 which provides that in all cases, except probate, “the appeal shall suspend the operation of the order, judgment, decree, or decision.” *Id.* The court found that the effect of that suspension was to “leave the situation the same as if the order terminating parental rights had never been entered. Thus, the adoption decree was entered without” the parent’s consent, which the trial court did not have the jurisdiction to do. *Id.* at 691. The court understood that setting aside an adoption decree is an “extreme decision” and is “fraught with possible consequences”; however, since they vacated the termination of parental rights, they had no choice. *Id.*

California provides statutory guidance to its courts in that it provides “the court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.” Cal. Wel. and Inst. Code Sec. 366.26. Likewise Florida statutes state that “an appeal of an order terminating parental rights suspends any provision in the order placing the child [for adoption.] The appellate court is required to expedite appeals concerning orders terminating parental rights, in part, to authorize adoptions as soon as possible.” Fla. Stat. Ch. 39.473(1), (3). Citing this statute, the Florida court of appeals found that proceeding with an adoption prior to the final disposition of an appeal may cause confusion and

possible future harm to the minors involved and therefore adoptions must be suspended during the course of an appeal. *In the Interest of J.R.G. v. State of Fla.*, 624 So. 2d 273, 275 (Fla. App. 1993) (A.42-44.)

As each of these cases and statutes reminds us, Relator's parental rights are fundamental.¹ These rights are protected by the substantive due process guarantees of the federal and Missouri Constitutions. Her well established

¹ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Relator's liberty interest in the care, custody and control of her child, is one of the oldest fundamental liberty interests recognized by the Supreme Court. *Id.* Relator has the right to direct the destiny of her children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

The United States Supreme Court has gone farther to state that fundamental liberty interests do not evaporate simply because they have not been model parents or have lost temporary custody of their child to another. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Because the termination of parental rights has been characterized as "tantamount to imposition of a civil death penalty," *In the Interest of K.A.W. and K.A.W.*, ___ S.W.3d ___ (Mo banc March 30, 2004), it is not disputed that state intervention to terminate the relationship between parent and child must be accomplished by procedures meeting the requisites of the Due Process Clause. *Santosky*, 455 U.S. at 753.

fundamental rights cannot be deemed to somehow carry less weight because she is a citizen of Missouri instead of Michigan, or any other state. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

In the case at hand, Relator's rights were terminated on January 12, 2004 during the adoption proceeding. (A.1-2.) During the course of trial, Relator contested the proposed termination of her rights and the adoption of her child. A Judgment and Decree of Adoption was entered by the trial court. (A.1-2.) Relator filed a timely appeal of the adoption and the termination of her parental rights. (A.48-49.) Relator made motion to the trial court to stay the adoption, but that motion was denied. (A.3-6.) ***At that point, although Relator was appealing the underlying cause of action, her child had a new name and new parents.*** The legal parent-child relationship had been severed. Relator filed a Petition for a Writ of Prohibition with this Court and a preliminary order was granted. Transfer of the appeal was granted by this Court because, among other issues, there is a Constitutional question involved.

Relator acknowledges the authority of the trial court to enter a judgment and decree pursuant to Sec. 453.040 and the need to proceed with an adoption of a child in the courts of Missouri in the most expedited fashion. However, that need cannot supercede Relator's fundamental parental rights or the right of a parent to appeal if those rights have been terminated. Logic dictates that all parties' rights are better protected if an adoption waits until the final resolution of a termination of parental rights case. Relator's intent in filing this Petition for Prohibition is to

protect her rights as guaranteed by the Constitutions of the United States and the State of Missouri.

Conclusion

Although a termination of rights or consent must be sought before an adoption can proceed, the converse is not always true in the State of Missouri at the present time. This Court has spoken on this issue when the State is involved in termination cases under Section 211.447. However, guidance is needed once again to assure the fundamental rights are protected in adoption cases which terminate a parent's rights under Section 453.040. Wherefore Relator prays that this Court enter a Writ in Prohibition prohibiting Judge DePriest from entering orders finalizing the adoption or, in the alternative, requiring him to rescind any orders which may have finalized the adoption of A.J.L.H. in order that Relator's appeal can be considered on its merits and decided by the appropriate Court without compromising competing interests.

Respectfully submitted,

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Certificate of Compliance

Comes now counsel for Relator and certifies that:

1. The brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidentiary support,
2. The brief complies with Rule 84.06(b),
3. The number of words contained in the brief is approximately 3,512 as listed by the word processor the document was prepared on.
4. The disk has been scanned for viruses and it is virus-free.

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